Supreme Court, U.S.
FILED
041427 APR 22 2005
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No. 04-

IN THE

Supreme Court of the United States

SUSIE ROSS, ET AL.,

Petitioners,

v.

CITIFINANCIAL, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is proper for a diverse defendant to allege fraudulent joinder to defeat diversity jurisdiction on grounds that can be asserted by diverse and non-diverse defendants alike, provided at least one claim in a case is directed solely against a diverse defendant.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, the court whose judgment is sought to be reviewed, are as follows.

Petitioners in this Court and Plaintiffs-Appellants in the underlying *Ross* matter are: Roy Allen, Jr.; Carol Buseck; Lena Chambers; Priscilla Chalmers; James E. Curtis; Debbie Gordon; Phillip Gordon; Eugene Haymon; Margaret Haymon; Monroe Hoggatt; Denita Johnson; Kelvin Johnson; Doris King; Faye Denise Logan; Ruby Magee; Chester Newman; Larry Pickens; Susie Ross; Sharon White; Karen Whitley; and Alisha F. Wilson.

Respondents in this Court and Defendants-Appellees in the underlying *Ross* matter are: Citifinancial, Inc., a Maryland corporation, formerly known as First Family Financial Services, Inc., formerly known as Commercial Credit of Mississippi; Citifinancial, Inc., a Tennessee corporation, formerly known as First Family Financial Services, Inc., formerly known as Commercial Credit of Mississippi; Citifinancial Services, Inc., a Georgia corporation; Union Security Life Insurance Company; American Security Insurance Company; Tracy Mitchell; Darla Farmer; Joe Smith; Valerie Stevens; and John Does 1-50.

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Petitioners Roy Allen, Jr., Carol Buseck, Lena Chambers, Priscilla Chalmers, James E. Curtis, Debbie Gordon, Phillip Gordon, Eugene Haymon, Margaret Haymon, Monroe Hoggatt, Denita Johnson, Kelvin Johnson, Doris King, Faye Denise Logan, Ruby Magee, Chester Newman, Larry Pickens, Susie Ross, Sharon White, Karen Whitley, and Alisha F. Wilson (collectively referred to as "Petitioners") file this Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's order denying remand in *Ross v. Citifinancial, Inc.*, (App. 16a-42a) is not reported. The district court's order denying remand in *Howard v. CitiFinancial, Inc.*, (App. 43a-65a) is reported at 195 F. Supp. 2d 811. The district court subsequently certified its orders denying remand in *Ross* and *Howard* for appeal, and the court of appeals granted leave to appeal.

The appeals in *Ross* and *Howard* were consolidated by the court of appeals. The opinion of the court of appeals affirming the district court's denial of remand (App. 1a-15a) is reported at 344 F.3d 458. A petition for rehearing and rehearing en banc was timely filed by Petitioners on September 12, 2003. The order of the court of appeals denying rehearing and rehearing en banc (App. 66a-68a) is not reported.

JURISDICTION

The judgment of the Fifth Circuit sought to be reviewed in this case was entered on August 29, 2003. The Petitioners' timely-filed request for panel rehearing and rehearing en banc

was denied on January 25, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the court of appeals.

STATUTES INVOLVED

28 U.S.C § 1332 provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
(1) citizens of different States . . . .

28 U.S.C. § 1441 provides:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

INTRODUCTION

The decision of the court below held that fraudulent joinder to defeat diversity could be found on grounds common to diverse and non-diverse defendants alike, namely the statute of limitations and Petitioners' supposed failure to adduce proof in support of their claims for relief. This decision contravenes the precedent of this Court, as well as decisions from the Third Circuit, Eighth Circuit, and Ninth Circuit which have held uniformly that fraudulent joinder cannot be found on grounds that can be asserted by both diverse and non-diverse defendants.

The gross misapplication of this Court's precedent by the court below has the potential to affect a large number of cases, given the thousands of cases that are removed to federal court in diversity jurisdiction each year. Also, the decision of the court below affects the fundamental matter of the proper balance of federal and state judicial power, by permitting federal courts to exercise jurisdiction they do not have over numerous cases which properly belong in state court. The question of the scope of the fraudulent joinder doctrine plainly is an important and recurring issue.

The decision of the court below in this case conflicts with the precedent of this Court, decisions of sister circuits, and even recent Fifth Circuit authority. This conflict reflects a pronounced need in the lower federal courts for guidance by this Court as to the correct scope of the fraudulent joinder doctrine, a subject which this Court has not addressed since early in the last century. To resolve the split in the circuits concerning the proper application of the fraudulent joinder doctrine and to clarify the scope of the doctrine, the Court should take review in this case.

STATEMENT OF THE CASE

This matter concerns consolidated appeals, namely, *Ross v. Citifinancial Inc.*, No. 02-60608 (5th Cir. filed July 22, 2002), and *Howard v. Citifinancial Inc.*, No. 02-60609 (5th Cir. filed July 22, 2002). In the *Ross* case Susie Ross, Denita Johnson, James E. Curtis, Larry Pickens, Doris King, Karen Whitley, Ruby Magee, Roy Allen, Jr., Chester Newman, Sharon White, Cora Edney, and Ralph King brought suit against Citifinancial, Inc., Citifinancial Services, Inc., Union Security Life Insurance Company, American Security Insurance Company, Tracy Mitchell, Darla Farmer, and Joe Smith in the Circuit Court of Holmes County, Mississippi. In the *Howard* case, Denise Howard, Lena Chambers, Priscilla Chalmers, Betty Whitley, Faye Denise Logan, Carol Buseck, Kelvin Johnson, Phillip Gordon, Debbie Gordon, Alisha F. Wilson, Margaret Haymon, Wanda Allen, Monroe Hoggatt, Eugene Haymon, and Eva Parker Hall brought suit against Citifinancial, Inc., Citifinancial Services, Inc., Union Security Life Insurance Company, American Security Insurance Company, Tracy Mitchell, Darla Farmer, Joe Smith, Valerie Stevens, and John Does 1-50 in the Circuit Court of Holmes County, Mississippi. In both *Ross* and *Howard* the plaintiffs alleged fraud and other state-law claims in connection with consumer loan transactions.[1]

Both cases were removed to the United States District Court for the Southern District of Mississippi in federal diversity jurisdiction. It was asserted that Tracy Mitchell, Darla Farmer, Joe Smith, and Valerie Stevens, who are current or former agents of Citifinancial, Inc., and Citifinancial

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1. Wanda Allen, Cora Edney, Eva Parker Hall, Denise Howard, Ralph King, and Betty Whitley voluntarily dismissed their claims without prejudice after the removal of *Ross* and *Howard* to federal court.

Services, Inc., and who, like the plaintiffs in *Ross* and *Howard*, are Mississippi citizens, had been fraudulently joined to defeat diversity jurisdiction because the plaintiffs could establish no claim against the agents under Mississippi law. The district court agreed. The district court held that the claims of Roy Allen, Jr., Karen Whitley, Doris King, Sharon White, Susie Ross, Carol Buseck, Monroe Hoggatt, and Kelvin Johnson against the non-diverse agents are time-barred. The district court held further that Roy Allen, Jr., Karen Whitley, Doris King, Ruby Magee, Chester Newman, and Monroe Hoggatt failed to produce sufficient evidence in support of their claims against the agents.[2] The district court certified its orders denying remand of the *Ross* and *Howard* cases for interlocutory appeal, which the United States Court of Appeals for the Fifth Circuit granted on July 26, 2002.

On August 7, 2003, a panel of the court of appeals issued *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir. 2003). The *Smallwood* panel held that a claim of fraudulent joinder based on grounds that can be asserted by diverse and non-diverse defendants alike "manifestly [goes] to the merits of the action as an entirety, and not to the joinder; that is to say, it indicate[s] that the plaintiff's case [is] ill founded as to all the defendants." *Id.* at 404 (quoting *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 153 (1914)). Accordingly, the *Smallwood* panel refused to permit a removing defendant to assert fraudulent joinder on the grounds that a plaintiff's claims against a non-diverse defendant were preempted by federal law, a defense that could be asserted by both the diverse and non-diverse defendant in the case.

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2. Roy Allen, Jr., Karen Whitley, Doris King, Sharon White, Susie Ross, Carol Buseck, Monroe Hoggatt, Kelvin Johnson, Ruby Magee, and Chester Newman were the only plaintiffs in *Ross* and *Howard* who asserted claims against the non-diverse agents.

See id. at 408. *See also Collins v. American Home Prods. Corp.*, 343 F.3d 765, 768-69 (5th Cir. 2003) (following the *Smallwood* panel's decision).

On August 29, 2003, a panel of the court of appeals affirmed the district court's denial of remand in this case. A request for rehearing and rehearing en banc followed. On September 10, 2004, the court of appeals, sitting en banc, issued *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir. 2004). The en banc court upheld the *Smallwood* panel's ruling that a claim of fraudulent joinder cannot be based on grounds that can be asserted by diverse and non-diverse defendants alike:

> [W]hen, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no [fraudulent] joinder; there is only a lawsuit lacking in merit. In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of [fraudulent] joinder is actually an attack on the merits of plaintiff's case as such – an allegation that . . . "the plaintiff's case [is] ill founded as to all the defendants."

Id. (quoting *Cockrell*, 232 U.S. at 153).

On November 9, 2004, the court of appeals directed the parties to this case to file supplemental briefs addressing the impact of the en banc *Smallwood* decision on this case. On January 25, 2005, the court below denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Court Below Is Contrary to this Court's Precedent.

The court below held that the non-diverse agents had been fraudulently joined to defeat diversity jurisdiction because Petitioners' claims against the agents are time-barred under Miss. Code Ann. § 15-1-49, which furnishes a three-year statute of limitations for Petitioners' claims, and because Petitioners failed to produce sufficient evidence in support of their claims against the agents. This finding of fraudulent joinder was based solely on an assessment of the merits of Petitioners' claims for relief, in contravention of the en banc *Smallwood* decision and the precedent of this Court upon which *Smallwood* rests. The precedent of this Court establishes that a defendant seeking removal cannot prove fraudulent joinder merely by contesting the validity of a plaintiff's claim for relief against diverse and non-diverse defendants alike. Instead, the defendant must show that a diversity-defeating defendant has no connection to a controversy.

In *Chesapeake & Ohio Railway Co. v. Cockrell*, the Court instructed that fraudulent joinder occurs when a plaintiff joins a non-diverse defendant who has "no real connection with the controversy." 232 U.S. at 152. "Merely to [deny] the allegations upon which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder, will not suffice." *Id.* The *Cockrell* case was a wrongful death suit arising from an incident in which a train killed a woman at a railroad crossing. *See id.* at 149-50. Joined as defendants were the railroad which owned the train that killed the plaintiff's decedent, as well as two of the railroad's employees, namely, the engineer and fireman who were operating the train when the accident giving rise to the suit occurred. *See id.* The defendant

railroad company sought removal of the case to federal court, asserting that its employees, the engineer and the fireman, had been fraudulently joined because they had not been negligent. *See id.* at 150-51.

The Court found that the railroad company had failed to establish diversity jurisdiction. To show fraudulent joinder in *Cockrell*, the railroad had to show that the engineer and fireman were not operating the train when the injury occurred, but the railroad failed to show this. The Court said, "With the allegation that [the engineer and fireman] were operating the train which did the injury standing unchallenged, the [railroad's] showing [of fraudulent joinder] amounted to nothing more than a [denial] of the charges of negligence [against the engineer and fireman]." 232 U.S. at 153.

The Court concluded, "As [the engineer and fireman] admittedly were in charge of the movement of the train, and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky [where the accident giving rise to the case occurred], to insist upon their presence as real defendants as upon that of the railway company." 232 U.S. at 153. "[T]herefore, . . . the petition for removal was not such as to require the state court to surrender its jurisdiction." *Id.* at 153-54. *See also Chicago, Rock Island & Pac. Ry. Co. v. Whiteaker*, 239 U.S. 421, 425 (1915) (holding that where "[t]here is nothing more than a [denial] of the cause of action [against a non-diverse defendant] . . . . the plaintiff has a right of action under the law of the state and to insist upon [the non-diverse defendant's] presence as a real defendant"); *Illinois Cent. R.R. Co. v. Sheegog*, 215 U.S. 308, 316 (1909) (rejecting the defendants' fraudulent joinder argument because "the joinder could not be fraudulent in a legal sense on any ground except that the charge against [the diverse defendant] was fraudulent and false").

By the same token, the Court has held that fraudulent joinder can be proven through summary evidence showing that a non-diverse defendant has no real connection to a controversy. For example, in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1907), a plaintiff sued his employer, the National Enameling and Stamping Company ("National"), and a non-diverse co-employee, George Wettengel, for injury caused by a machine that allegedly was defectively designed. *See id.* at 178-79. National asserted that Wettengel was fraudulently joined and submitted in support of the claim uncontradicted affidavits by Wettengel and the chief engineer of the company showing that Wettengel was merely a draftsman with no responsibility for designing the machine that caused the injury at issue in the case. *See id.* at 183-84.

The Court found that the affidavits submitted by National proved fraudulent joinder. The Court said, "[i]n view of this testimony and the apparent want of basis for the allegations of the [removal] petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think . . . he was joined for the purpose of defeating the right of the corporation to remove the case to the Federal court." *Wecker*, 204 U.S. at 185. *See also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 94, 96-98 (1921) (in a suit for personal injuries by a plaintiff against his employer and a non-diverse co-employee, holding that the case was properly removed to federal court where the plaintiff failed to controvert allegations in a verified petition for removal that the co-employee "was not present when the plaintiff's injuries were received, and did no act or deed which caused or contributed to such injuries"); *Smallwood*, 385 F.3d at 574 n.12 (offering examples of certain kinds of facts that, if proved by summary evidence, establish fraudulent joinder: "For example, the in-state doctor defendant did not treat the plaintiff patient, the in-state pharmacist defendant did not fill a

prescription for the plaintiff patient, a party's residence was not as alleged, or any other fact that easily can be disproved if not true.").

In this case the removing defendants never put on evidence showing that, for example, the diversity-defeating defendants never worked for Citifinancial, Inc., and Citifinancial Services, Inc., or that they were never involved in any transaction to which Petitioners were parties. Instead the removing defendants merely contested the merits of Petitioners' claims. The finding of fraudulent joinder in this case clearly operated to discharge the liability of both diverse and non-diverse defendants alike.

There is no way that the district court could find fraudulent joinder in this case without resolving, at least in part, the liability of diverse defendants. This is because the liability of Citifinancial, Inc., and Citifinancial Services, Inc., is at least partly vicarious of the liability of their diversity-defeating agents. *See Napp v. Liberty Nat'l Life Ins. Co.*, 159 So. 2d 164, 166 (Miss. 1963) (discussing a principal's liability for an agent's intentional tort under Mississippi law); *Billups Petroleum Co. v. Hardin's Bakeries Corp.*, 63 So. 2d 543, 546-48 (Miss. 1953) (same). Also, the district court's finding of fraudulent joinder binds it under the doctrine of the "law-of-the-case" to give judgment for the diverse defendants on the same grounds that it found fraudulent joinder. *See Smallwood*, 385 F.3d at 574. *See also Messinger v. Anderson*, 225 U.S. 436, 444 (1912).

Moreover, for the district court not to give judgment for the diverse defendants in this case on the same grounds on which it found fraudulent joinder would be tantamount to an admission that the non-diverse defendants were not fraudulently joined, requiring immediate remand of the case to state court.

The finding of fraudulent joinder in this case is simply a ruling on the merits of Petitioners' claims against diverse and non-diverse defendants alike, a determination only a state court can make. The decision of the court below is "repugnant to controlling rules and decisions of this Court," so that certiorari should be granted. *Wilson v. Schnettler*, 365 U.S. 381, 383 (1961).

II. The Decision of the Court Below Creates a Circuit Split.

Just as the decision of the court below flagrantly ignores the precedent of this Court, so it creates a split in the authority from sister courts of appeals, namely, the Third Circuit, the Eight Circuit, and the Ninth Circuit. In contrast to the court below, those courts have held that as a general rule fraudulent joinder may not be alleged on grounds that can be asserted by diverse and non-diverse defendants alike.

In *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108 (3d Cir. 1990), a suit by a former tool dealer against a tool manufacturer and two of the manufacturer's employees alleging, inter alia, fraudulent inducement to enter a franchise agreement, the court rejected a claim of fraudulent joinder based on a defense of release common to diverse and non-diverse defendants. The court said, "the dispositive defense, that based on the release, was raised by all three defendants. Similarly, the Boyers' arguments that the release was invalid involve identical legal and factual issues applicable to the individual defendants and [the removing defendant]." *Id.* at 113. The court continued:

> Informed by [*Chesapeake & Ohio Railway Co. v.*] *Cockrell*, we hold that where there are colorable claims or defenses asserted against or by diverse and non-

> diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court.

Id. See also Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992).

Similarly, in *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), a diverse defendant alleged that certain non-diverse defendants had been fraudulently joined because claims against them were time-barred under California law. The court recognized the general rule set forth in *Cockrell* that a claim of fraudulent joinder based on grounds common to diverse and non-diverse parties is improper. The court noted that the general test of fraudulent joinder is whether a non-diverse defendant has "no real connection with the controversy." *Id.* at 1318 (quoting *Wilson*, 257 U.S. at 97). The court observed also that "[t]here is a distinction" between an inquiry as to "whether the plaintiff truly [has] a cause of action against . . . alleged sham defendants" and "an inquiry as to whether those defendants could propound defenses to an otherwise valid cause of action." *Id.* In the latter instance, the court said, the claim of fraudulent joinder goes to "the merits of the action as an entirety, and not to the joinder; that is to say, it indicate[s] that the plaintiff's case [is] ill founded as to all the defendants." *Id.* (quoting *Cockrell*, 232 U.S. at 153).

However, the *Ritchey* court created an exception to *Cockrell*, reasoning that under California law the defense of the statute of limitations at issue was not one that addressed the merits of the case. "California has emphasized the fact that the statute of limitations is a kind of procedural bar, and not one which relates to the merits of the case." 139 F.3d at 1319.

"In fact, California has pointed out that a judgment based on the statute of limitations regarding a cause of action in one suit is not necessarily res judicata in a second suit, which pleads a different cause of action based on the same core of underlying facts." *Id.*

Because in the *Ritchey* court's view a limitations defense under California law does not address the merits of a plaintiff's claim, the court held that such a defense can be asserted as the basis for a claim of fraudulent joinder even if the same defense is available to both diverse and non-diverse defendants. *See* 139 F.3d at 1319-20.[3] *See also Huffman v. Baldwin*, 82 F.2d 5, 8 (8th Cir. 1936) (stating that when allegations of fraudulent joinder amount to a "general denial" of wrongdoing that "affect[s] all defendants" and "involve[s] the merits of the controversy," such allegations "ha[ve] no

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3. The *Ritchey* court relied upon decisions of California state courts holding that, consistent with the general common-law rule, a statute of limitations runs against a remedy, not a right, so that the running of a limitations period does not necessarily preclude a new suit to enforce the right. *See* 139 F.3d at 1319 (citing, inter alia, *Piazza Props., Ltd. v. Department of Motor Vehicles*, 138 Cal. Rptr. 357, 360 (Cal. Ct. App. 1977), and *Koch v. Rodlin Enters.*, 273 Cal. Rptr. 438, 441-42 (Cal. Ct. App. 1990)). The court seems also to have relied upon the principle that the statute of limitations is a defense personal to a party entitled to plead it and thus can be waived if not pleaded. *See id.* (citing *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), and *O'Neil v. Spillane*, 119 Cal. Rptr. 245, 252 (Cal. Ct. App. 1975)). In contrast to California law as expounded in *Ritchey*, under Mississippi law the expiration of a Mississippi limitations period operates to extinguish substantive rights as well as to cut off any remedy. *See* Miss. Code Ann. § 15-1-3; *Proctor v. Hart*, 16 So. 595, 596 (Miss. 1895). Also, because a limitations defense is personal to the defendant entitled to plead it, as a general rule such a defense cannot be asserted by a defendant on behalf of a co-defendant. *See Goldberg, Bowen & Co. v. Demick*, 247 P. 261, 263 (Cal. Dist. Ct. App. 1926); *Lewis v. Buckley*, 19 So. 197, 198 (Miss. 1895); 51 Am. Jur. 2d *Limitation of Actions* § 69 (1964 & Supp. 2004) (collecting cases).

tendency to show any fraudulent joinder of resident defendants to prevent removal").

The decision of the court below obviously is in conflict with authority from sister circuits. A grant of certiorari is necessary to bring the decision of the court below into line with decisions of other federal courts of appeals regarding the scope of the fraudulent joinder doctrine. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of . . . federal law.").

III. The Court Below Misapplied the Precedent of this Court.

The decision of the court below rests upon a bizarre misreading of *Cockrell*, namely, that fraudulent joinder to defeat diversity can be alleged on grounds that can be asserted by diverse and non-diverse defendants alike, provided at least one claim in a case is directed solely against a diverse defendant. In *Cockrell*, as discussed, the Court held that a claim of fraudulent joinder must be rejected where it amounts to an assertion that "the plaintiff's case [is] ill founded as to all the defendants." 232 U.S. at 153. However, a "case" is not, as the court below reasoned, "all of the claims asserted in a plaintiff's complaint." Instead, a "case" is any claim for relief asserted in a plaintiff's complaint. Thus, allegations of fraudulent joinder that challenge the merits of any claim for relief in a plaintiff's complaint are improper.

As discussed, on November 9, 2004, the court below directed the parties to this case to file supplemental briefs addressing the impact of the en banc *Smallwood* decision on this case. On November 16, 2004, a panel of the court

below, per curiam, issued *Rainwater v. Lamar Life Insurance Co.*, 391 F.3d 636 (5th Cir. 2004). The *Rainwater* decision sought to harmonize the obvious conflict between the panel's decision in this case and *Smallwood*.[4]

The *Rainwater* court concluded that, under *Smallwood*, if a claim of fraudulent joinder "precludes recovery against all defendants, resident and diverse, . . . such a determination [goes] 'to the entire case' rather than to the appropriateness of the joinder." 391 F.3d at 638 (quoting *Smallwood*, 385 F.3d at 574). However, the *Rainwater* court concluded further that a claim of fraudulent joinder on grounds common to diverse and non-diverse defendants alike violates the strictures of *Smallwood* and the authority of this Court upon which *Smallwood* relies only when it "disposes of all claims against all defendants." *Id.* Conversely, when a claim of fraudulent joinder on grounds common to diverse and non-diverse defendants "does not dispose of all claims against [a diverse defendant]," then "inclusion of such claims against [the diverse defendant] . . . . preclude[s] remand under the rule of *Smallwood*." *Id.*

In other words, under the reasoning of *Rainwater*, if a complaint contains at least one claim directed solely against a diverse defendant, then it is proper for a court to find fraudulent joinder on grounds that can be asserted by diverse

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4. As discussed, the panel's decision in this case was issued about three weeks after the panel decision in *Smallwood*. The inconsistency between *Smallwood* and the precedent of this Court on which it relied, on the one hand, and the decision of the panel in this case, on the other hand, immediately became a source of confusion in the district courts. *See, e.g., In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d 288, 301-02 (D. Mass. 2004); *Griffin v. American Gen. Fin., Inc.*, 2004 WL 716777, at *5 n.7 (N.D. Miss. May 17, 2004); *Smith v. Union Nat'l Life Ins. Co.*, 286 F. Supp. 2d 782, 785-86 (S.D. Miss. 2003).

and non-diverse defendants alike. *See* 391 F.3d at 638-39 (remanding the case so that the district court could determine whether the plaintiffs' complaint contained any claims directed solely against a non-diverse defendant; if so, the district court could find that certain non-diverse agents of the diverse defendants had been fraudulently joined based on a defense of the statute of limitations common to diverse and non-diverse defendants alike). Denial of rehearing in this case soon followed.

The obvious fallacy in the reasoning of *Rainwater* and the decision in this case is that a plaintiff's "case" is not all of the claims for relief asserted in a complaint. Instead, a case is any claim for relief asserted in a complaint, although modern rules of civil procedure permit a plaintiff to join freely in a single complaint numerous claims for relief that arise from a common nexus of operative fact. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) (construing Fed. R. Civ. P. 20). Thus, allegations of fraudulent joinder are improper if they amount merely to a challenge to any of a plaintiff's claims for relief asserted in a single complaint. As the Court has instructed, "In no case can the right of removal be established by a petition to remove which amounts simply to a [denial] of the facts alleged in the plaintiff's [complaint], and in that way undertaking to try the merits of a cause of action, good upon its face." *Southern Ry. Co. v. Lloyd*, 239 U.S. 496, 500 (1916).[5] *See also Simmons v. Norfolk S. Ry. Co.*, 324 F. Supp. 2d 914, 916 (S.D. Ill. 2004) (quoting *Whiteaker*, 239

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5. A "cause of action" is of course the "group of operative facts giving rise to one or more bases for suing" or, differently put, "a factual situation that entitles one person to obtain a remedy in court from another person." Black's Law Dictionary (8th ed. 2004). It is the ancestor of the modern "claim for relief." Fed. R. Civ. P. 8(a). *See also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 (2004 & Supp. 2005).

U.S. at 425) ("There is nothing more than a [denial] of the cause of action in the present case . . . . We conclude . . . that the plaintiff has a right of action under the law of the state and to insist upon [the non-diverse defendant's] presence as a real defendant.").

Under the reasoning of *Rainwater* and the decision in this case, any plaintiff who amends his or her complaint to assert a claim solely against a diverse defendant thereby creates complete diversity of citizenship. *See* 28 U.S.C. § 1446(b) (a case can be removed thirty days from the date a defendant receives a pleading or other paper showing the existence of federal subject matter jurisdiction). Likewise, even if a case has been removed and remanded, addition of a claim solely against a diverse defendant creates complete diversity of citizenship. *See Fritzlen v. Boatmen's Bank*, 212 U.S. 364, 372-73 (1909) (successive removals are permitted when new evidence discloses the existence of federal jurisdiction). Presumably, however, if after removal in diversity a complaint were amended in federal court to assert a claim solely against a diverse defendant, this would not create complete diversity of citizenship. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1929-30 (2004) (post-removal events cannot cure jurisdictional defects that existed at the time a case was removed in diversity, at least where such an event involves no change of parties). The silliness of the reasoning of *Rainwater* and the decision in this case is obvious.

It is apparent that in both *Rainwater* and this case the court below grossly misread *Cockrell*. In light of the misapplication of this Court's precedent by the court below, certiorari should be granted. *See United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 108-09 (1958) (the Court granted certiorari to review a judgment of a federal court of appeals because of a claim that the court of

appeals had misinterpreted a prior decision of the Court and that the judgment seriously frustrated the proper administration of a statute); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 199-200 (1956) (a doubtful application of the *Erie* doctrine by a federal court of appeals impelled the Court to grant certiorari).

IV. The Petition Before the Court Presents an Important and Recurring Question.

The scope of the fraudulent joinder doctrine obviously is an issue capable of affecting a large number of cases. More than one in six cases filed in federal court in 2003 was a case removed from state court. *See* Analytical Servs. Office, Office of Judges Programs, Admin. Office of the U.S. Courts, Judicial Facts and Figures tbl.2.12 (2003), *at* http://www.uscourts.gov/library.html (stating that 44,193 of the 253,015 cases filed in federal district court in 2003 were removal cases).

In civil cases removed to federal court in diversity, fraudulent joinder is a bitterly litigated issue, because plaintiffs and defendants alike regard forum as critical to success. "The presumption is that federal courts are more defendant-friendly . . . . Because of this, the respective interests of plaintiffs and defendants make the battle over a state or federal forum especially fierce." Heather R. Barber, *V. Removal & Remand*, 37 Loy. L.A. L. Rev. 1555, 1555 (2004). *See also* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates & Removal Jurisdiction*, 83 Cornell L. Rev. 581, 606-07 (1998) (arguing based on statistical evidence that removal from state to federal court reduces a plaintiff's chance of winning from 50 percent to 35 percent); Erik B. Walker, *Keep Your Case in State Court: Defendants Know That*

Litigating in Federal Court Can Be Costly & Time-Consuming for Plaintiffs, Trial, Sept. 2004, at 22, 22-23 (expressing the received wisdom among plaintiffs' lawyers that federal courts are hostile to plaintiffs and friendly to defendants); Jay S. Blumenkopf, Kristina B. Pett, & Michael S. Metta, *Fighting Fraudulent Joinder: Proving the Impossible & Preserving Your Corporate Client's Right to a Federal Forum*, 24 Am. J. Trial Advoc. 297, 310-11 (2000) (expressing the received wisdom among corporate defense lawyers that a federal forum is more desirable for defendants).

Whatever the truth of the stereotypes about the desirability of a state or a federal forum as between plaintiffs and defendants, the impact of those stereotypes on litigation conduct is undeniable. As one commentator observes with respect to foreign defendants' preference for a federal forum, "[A]ttempts to focus on the extent of empirical evidence showing prejudice against out-of-state litigants is misplaced, since fear of prejudice can be as potent as actual bias itself." Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 Brook. L. Rev. 197, 204 (1982). *See also Smallwood*, 385 F.3d at 574 (warning district courts to limit the time and resources they devote to evaluating claims of fraudulent joinder: resolving such claims should not "should not entail substantial hearings" and "[d]iscovery by the parties should not be allowed except on a tight judicial tether, sharply tailored to the question at hand, and only after a showing of its necessity.");[6] *Arnold v. State Farm Fire & Cas.*

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6. In fact in this case the district court permitted the defendants to conduct extensive discovery as to the merits of the plaintiffs' claims in support of the defendants' response to the plaintiffs' request for remand of those claims to state court. As the *Smallwood* court recognized, this type of discovery is not only inappropriate in evaluating a claim of fraudulent joinder but also expensive and time-consuming for litigants and the courts.

Co., 277 F.3d 772, 774 (5th Cir. 2001) (observing that, "[a]s [Mississippi state] courts have become a mecca for plaintiffs' claims against out-of-state businesses, Mississippi is affording numerous opportunities for federal courts to explore questions of removal jurisdiction and remand.").

Because the issue of the scope of the fraudulent joinder doctrine affects a large number of cases, it also affects the fundamental principles of federalism. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). "Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999). "Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed." *Id.* at 583. *See also Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction . . . functions as a restriction on federal power, and contributes to the characterization of the federal sovereign.").

The scope of the fraudulent joinder doctrine is an issue that affects many cases as well as the fundamental balance of federal and state judicial power. Moreover, the impossibility of reconciling the decisions of the court below in this case and in *Rainwater*, on the one hand, with the decisions in *Smallwood* and *Collins* and the authority of this Court upon which they rely, on the other, illustrate the extent to which the lower federal

courts are in confusion as to the proper scope of the fraudulent joinder doctrine. This confusion no doubt is attributable to the fact that the Court has not squarely addressed the subject of fraudulent joinder in over eighty years. *See Wilson*, 257 U.S. at 96-99. Certiorari should be granted because the question presented by this petition is important and recurring. *See Perry v. Leeke*, 488 U.S. 272, 277 (1989); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959). Certiorari should be granted also because clarification of the scope of the fraudulent joinder doctrine is badly needed in the lower federal courts. *See Rosenberg v. United States*, 360 U.S. 367, 368-69 (1959); *Radovich v. National Football League*, 352 U.S. 445, 447 (1957).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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